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Michelle Evans Dr
Murdoch University, michelle.evans@murdoch.edu.au

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The Principle of Subsidiarity in European Union Law: Some Comparisons with Catholic Social Teaching

Abstract

This paper is the second of two papers which examine the versatility of the principle of subsidiarity. The first paper explored the nature of the principle in Catholic social teaching as a moral and social principle and its potential application in the political sphere. This paper further explores the political application of the principle of subsidiarity through a discussion of its operation in the European Union, where it is embodied in article 5(3) of the *Treaty on European Union*. This paper discusses subsidiarity's interpretation by the European Court of Justice as a political value judgement, rather than a legal principle. In its discussion of subsidiarity in the European Union, this paper draws some comparisons with the principle's enunciation in Catholic social teaching. Together, these papers are intended to highlight the many facets of the principle of subsidiarity in order to promote its continued relevance and to promote further scholarship on subsidiarity.

The Principle of Subsidiarity in European Union Law: Some Comparisons with Catholic Social Teaching

Michelle Evans

The principle of subsidiarity, as it was originally intended in European Union law, provides that if a matter does not fall within the exclusive competence¹ of the relevant Community institutions ('the Community') and can be better resolved by the individual member states (that is, individual countries who are members of the European Union), the Community should *not* intervene, so that the matter can be resolved at a local level, by member states.² Hence, the principle of subsidiarity in the European Union can be seen as an adaption of the principle from Catholic social theory to European Union governance.

The current principle of subsidiarity is referred to on several occasions in the *Treaty on European Union* ('TEU'), which came into force on 1 December 2009,³ specifically in the Resolutions section and in arts 5(1), 5(3), 5(4)⁴ and 12(b). As these sections were originally drafted using general language, and without specific direction as to how the principle should be applied, the application of the principle was subsequently defined in instruments such as the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*.⁵ These will be outlined in detail in this paper to provide an overview of the meaning and operation of subsidiarity in European Union law. Whilst doing so, links and comparisons will be made between the operation of the principle in the European Union and its modern origins in Catholic social theory and political theory. This paper will also explore the question of whether subsidiarity in the European Union is a political or legal concept, with reference to

* I would like to thank two anonymous referees, as well as Fr Richard Umbers, for their detailed and insightful comments on this paper.

¹ For a discussion of 'exclusive competence' see Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European Cultural Studies* (Europa Law Publishing, 2007) 13, 14–19. Areas of exclusive competence include common commercial policy, establishing internal competition rules, monetary policy, customs and international agreements involving the Union: see Van Ooik, 14–15. For a discussion of the principle of subsidiarity in the context of European Union law see Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European Cultural Studies* (Europa Law Publishing, 2007) 13; Josephine Steiner and Lorna Woods, *EU Law* (Oxford University Press, 2009) 61–62.

² Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 27–28. For a discussion of 'exclusive competence' see Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European Cultural Studies* (Europa Law Publishing, 2007) 13, 14–19. Areas of exclusive competence include common commercial policy, establishing internal competition rules, monetary policy, customs and international agreements involving the Union: see Van Ooik, 14–15. For a discussion of the principle of subsidiarity in the context of European Union law see Ronald van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D Obradovic and N Lavranos, *Interface Between EU Law and National Law: Proceedings of the Annual Colloquium of the G K van Hogendorp Centre for European Cultural Studies* (Europa Law Publishing, 2007) 13; Josephine Steiner and Lorna Woods, *EU Law* (Oxford University Press, 2009) 61–62.

³ TEU art 5(3) states: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

⁴ This article was formerly art 3(b) of the TEU.

⁵ *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C 83/206 ('Protocol').

relevant cases from European Court of Justice, and will conclude with some observations regarding the diverse and continued relevance of the principle, and its links to Catholic social teaching.

I. An Overview of Subsidiarity in the European Union

In a similar fashion to Catholic social theory, which favours individual action over intervention by a higher authority, subsidiarity in the European Union favours national autonomy over central regulation. In other words, the individual countries that are members of the European Union (the member states) are commensurate to the ‘individual’ in Catholic social theory. Cooper explains the operation of subsidiarity in this transnational context:

The essence of subsidiarity is the normative requirement that central authority governs in a manner that respects the autonomy of local authority. The basic philosophy of how higher authority should relate to lower authority remains the same, even though the identity of these authorities has changed: whereas originally subsidiarity had required the state to act in a manner that respects the autonomy of subnational groups, it now requires a supranational entity, the European Union, to act in a manner that respects the autonomy of states. In this context, subsidiarity retains the notion that collective autonomy has an inherent value that must be respected, not just as a matter of efficiency but of morality.⁶

It is interesting to note Cooper’s reference to ‘morality’. It is reminiscent of the principle in Catholic social theory and the ‘... grave evil, and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies’, stated by Pope Pius XI in his his Encyclical Letter, *Quadragesimo Anno*.⁷ Further, the extension of the principle into the realm of political theory as justification for decentralisation, has been applied in the use and application of the principle in the European Union. The decentralist philosophy behind European Union subsidiarity was summarised by Vause:

The principle of ‘subsidiarity’ in EU Law requires that action to accomplish a legitimate government objective should in principle be taken at the lowest level of government which is capable of effectively addressing the problem. In effect, subsidiarity is a guideline for contemporary power-sharing between the relatively new institutions of the EU and the constituent Member States that formed the Union.⁸

Like Catholic social theory, the ‘power-sharing’ aspect of the principle of subsidiarity identified by Vause in the above quotation also means that subsidiarity can operate in reverse. That is, in the European Union, the application of subsidiarity acknowledges that it may be more appropriate for decisions to be made, and problems to be resolved, centrally in certain

⁶ Ian Cooper, ‘Subsidiarity and Autonomy in the European Union’ in Louis W Pauly and William D Coleman (eds), *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 236. See also,

⁷ Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical ‘Rerum Novarum’* (Australian Catholic Truth Society, 1931) para 79.

⁸ W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 62.

circumstances. A parallel can be identified here with the Church, which, as noted by Pope Pius XI, is justified in intervening at any level when morality requires it.⁹ A further parallel exists with the World-Wide authority discussed in Pope John XXIII's encyclical, *Peace on Earth* which may intervene to promote the universal common good¹⁰, and the global authority advocated by Pope Benedict XVI to address global issues such as poverty and the global financial crisis.¹¹

II. A Legal or Political Concept?

In Catholic social teaching, the principle of subsidiarity is a social and moral principle which can be applied in other contexts, such as in the area of politics and government. In the European Union, there is conflicting commentary as to the exact nature of the principle of subsidiarity; specifically, whether it is a binding legal principle or a political or policy-based principle of an aspirational nature (which is therefore outside the jurisdictional ambit of a court to assess).

For example, Steyger argues that 'its incorporation into the Treaty elevates it to a legal principle', although she acknowledges the argument that it is also a political principle.¹² Carozza goes further, referring to it as one of the European Union's 'central constitutional principles'.¹³ Alternately, Kiiver states that, 'The principle is not strictly legal but bears political implications, and moreover it has distinct anti-federalist connotations.'¹⁴ However, de Búrca describes the principle of subsidiarity as both political and legal, but at the same time acknowledges the principle as having a philosophical basis that denies categorisation:

The notion of subsidiarity is clearly a political and legal principle which was adopted and developed within the EU to address issues of competence and the exercise of power as between the Member States and the European institutions. But it can also be more broadly understood as part of a language which attempts to articulate and to mediate, albeit within this particular geographical and political context, some of the fundamental questions of political authority, government and governance which arise in an increasingly interlocking and interdependent world. As Held has aptly commented, 'the very process of governance seems to be "escaping the categories" of the nation state.'¹⁵

Thus, the principle, in the context of European Union law, is multifaceted. It can aptly be described as 'all of the above'; namely legal, political (including policy-based) and

⁹ Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical 'Rerum Novarum'* (Australian Catholic Truth Society, 1931) para 41-43.

¹⁰ John XXIII, *Encyclical Letter: Peace on Earth* (Pauline Books and Media, 1963) para 139-145.

¹¹ Benedict XVI, *Caritas in Veritate* (Libreria Editrice Vaticana, 2009), para 67. The full text of this encyclical letter is available at: http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html

¹² Elies Steyger, *Europe and its Members: A Constitutional Approach* (Dartmouth Publishing, 1995) 64.

¹³ Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *The American Journal of International Law* 38, 38.

¹⁴ Philipp Kiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (Kluwer Law International, 2006) 157-158.

¹⁵ Gráinne de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 3.

philosophical. Jean-Claude Piris, commented that subsidiarity in the European Union context is ‘an essentially political and subjective principle’¹⁶ due to the degree of discretion and restraint involved in the application of the principle. As Piris notes, this is because the central question to ask in cases of shared competence when deciding whether the Community will exercise the power, or whether individual member states should, involves a ‘value judgment’.¹⁷ The question is whether ‘the objective [of the power] may be **better** achieved by the Community than by the Member States.’¹⁸

Perhaps, however, the true categorisation of the principle can be based on its limited effectiveness. That is, the application of the principle in the European Union has not succeeded as a legal principle, and is more of a political or policy-based theory, reminiscent of the moral nature of the principle in Catholic social theory, that is aspired to, but difficult to enforce in reality. The limited effectiveness of the principle as a legal principle, and its success as a political judgment to be made by legislators, will be evident from a discussion of select cases from the European Court of Justice later in this paper.

III. An Overview of European Union Institutions

It is necessary to outline briefly the governance structure of the European Union in order to understand the operation of the principle of subsidiarity in the European Union. The European Union consists of 27 countries which have agreed to form ‘an economic trading bloc’.¹⁹ Each of these separate countries is known as a ‘member state’ and retains its status as a separate and independent country with its own government, language and culture. Therefore, the formal incorporation of subsidiarity into the European Union was of importance to member states’ autonomy, with some in particular being wary of centralisation.²⁰ The European Union has a cumbersome governance structure consisting of the European Commission, the Council of the European Union, the European Parliament, the European Council and the European Court of Justice. There is also a European Central Bank, a European Ombudsman and many committees including a Committee of the Regions.²¹

The *Commission* is the executive arm of government in the European Union.²² Its members are appointed for a five year term²³ by the Council, with suggestions for their appointments

¹⁶ Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 8.

¹⁷ Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 8.

¹⁸ Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 7. Emphasis in original.

¹⁹ Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 1.

²⁰ For example, Germany and Denmark. W Gary Vause, ‘The Subsidiarity Principle in European Union Law — American Federalism Compared’ (1995) 27 *Case Western Reserve Journal of International Law* 61, 64–65.

²¹ For an overview and discussion of these institutions, see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 18–25.

²² TEU art 17(1).

²³ TEU art 17(3).

being made by member states.²⁴ The Commission is headed by a President elected by the European Parliament.²⁵ It oversees the treaties that govern the European Union and has the responsibility of implementing legislative measures by regulations and directives²⁶ made by the European Parliament. The Commission also formulates policy for the European Union.²⁷ Due to its executive nature, the Commissioners are expected to act in the ‘general interests’ of the European Union, rather than those of their respective countries.²⁸

Like the Commission, the *Council* is somewhat executive in nature, having a ‘policy-making and coordinating role.’²⁹ However, its Members represent the interests of their respective governments and act on their governments’ instructions.³⁰ The Council also has legislative and budgetary powers jointly with the European Parliament.³¹ In order to be passed, a proposed law must receive a qualified majority, meaning 55% of the member states must support it, and those States must comprise 65% of the population of the European Union.³²

Whereas the Council represents the governments of the European Union, the *European Parliament* represents the citizens of the European Union,³³ is directly elected by them, and is the political arm of governance in the European Union.³⁴ It has legislative power and drafts the annual budget.³⁵ Proposed laws generally originate in the Commission, which submits the legislative proposal to Council and Parliament.

The heads of state and governments of the various countries that are members of the European Union form the *European Council* and make decisions by ‘consensus’.³⁶ It is a political and policy-making body, as opposed to a legislative one.³⁷ The European Council is headed by a President, appointed for a two-and-a-half-year term, by a qualified majority vote of the European Council.³⁸

The *European Court of Justice* comprises one Judge from each member state.³⁹ Judges are appointed for a six-year term, are independent,⁴⁰ and cannot be dismissed by their member

²⁴ TEU art 17(7).

²⁵ TEU art 17(7).

²⁶ TEU art 17(1). In the European Union, the term ‘regulation’ is used instead of ‘Legislation’. In addition, a ‘Directive’ may also be made, which is a lesser form of regulation. Bridge defines a ‘Directive’ as follows: ‘The essence of a Directive is that it specifies a binding objective which is to be achieved but leaves the choice of form and methods for its implementation to the discretion of each Member State. By this means the Community will achieve its objective while its actual implementation will be at the lower political level of each Member State and by a form and method appropriate to each’: See John W Bridge, ‘Constitutions, Powers and the Doctrine of Subsidiarity’ (1999) 31 *Bracton Law Journal* 49, 51–52. Therefore a Directive will often be more consistent with respecting the principle of subsidiarity.

²⁷ TEU art 17(1).

²⁸ TEU art 17(1). See also *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) (‘TFEU’), arts 244–250.

²⁹ Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 20. See TEU art 16(1).

³⁰ TEU art 16(2).

³¹ TEU arts 14(1) and 16(1).

³² TEU art 16(4). See also TFEU arts 237–243.

³³ TEU art 10(2).

³⁴ TEU art 14(2).

³⁵ Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 20–21. See TEU art 14(1).

³⁶ TEU art 15(4).

³⁷ TEU art 15(1).

³⁸ TEU art 15(2). See also TFEU arts 235–236.

³⁹ TEU art 19(2).

⁴⁰ TFEU art 254.

states.⁴¹ Court judgments are collective, which means that there are no dissenting judgments, and no one Judge is attributed authorship.⁴² The Court is not bound to follow prior judgments, although it generally does so.⁴³ There are eight Advocates-General who independently advise the Court as to how it should decide cases, and who are not limited to arguments raised by the parties.⁴⁴

The final institution relevant to this paper's discussion of subsidiarity is the *Committee of the Regions*. Moens and Trone describe the Committee as 'an advisory body representing the regional and local governments of the EU'.⁴⁵ The Commission and Council must consult the Committee about 'issues with a regional or local impact'.⁴⁶ The Committee has standing to bring an action before the European Court of Justice if, for example, it has not been consulted by the Commission and Council when required.⁴⁷

IV. Subsidiarity and Treaty Provisions

The first reference to the principle of subsidiarity in the *TEU* is contained in the Resolutions which provide that states parties: 'Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.'⁴⁸ Following this, art 5(1) provides, 'The use of Union competences is governed by the principles of subsidiarity and proportionality.' Article 5(3) of the *TEU* provides further guidance about the meaning of the principle:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol ...

⁴¹ *Protocol (No 3) on the Statute of the Court of Justice of the European Union* [2010] OJ C 83/210 ('*Statute of the Court of Justice*'), arts 5 and 6. See also Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 337–338.

⁴² *Statute of the Court of Justice* arts 35 and 36. See also Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 338.

⁴³ Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 338–339.

⁴⁴ *TFEU* arts 252 and 253.

⁴⁵ Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 24.

⁴⁶ Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 24–25.

⁴⁷ See *TFEU* art 263 and Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 25.

⁴⁸ 'States Parties' refers to the Member States (ie. the individual countries) who are signatories to the treaty.

The primary focus of this paper is subsidiarity. Consequently, the concept of ‘proportionality’ will only be outlined briefly here. In summary, the principle of proportionality is contained in the last paragraph of art 5(3) which provides, ‘Any action of the community shall not go beyond what is necessary to achieve the objectives of the Treaty.’ Jean-Claude Piris as ‘Legal Advisor to the Council of the European Union and Director-General of the Council’s Legal Service’ notes that proportionality applies to both exclusive and non-exclusive areas of competence and cites the test for proportionality, as interpreted in European Union case law.⁴⁹ This test requires that a law must use appropriate means to achieve its objective, and no more.⁵⁰ Piris gives the following example to illustrate the operation of the proportionality principle:

To give a typical example of the principle of proportionality, one might cite cases where, when the objective of a measure is to protect consumers, a decision might be taken that the composition of a product must be properly indicated on the labelling rather than requiring the details of its composition to be harmonised, which would be tantamount to banning certain kinds of production. Another example is that of certain very localised products, the production and sale of which are authorised in one or two Member States, but which others do not want to be sold in their territory. Rather than banning such products, it might be specified that they cannot be exported to the other Member States but are reserved for local consumption (eg. ‘snus’, chewing tobacco used in Sweden and Finland).⁵¹

The question of proportionality is determined after that of subsidiarity. Thus, as Piris explains, where there is shared competence, the first question is whether ‘the Treaty has granted the Community power to act’ in the first place; the second is whether ‘the objectives of the action can be better achieved at Community level’ (subsidiarity); and the third is ‘how and how intensively to act, limiting action to what is strictly necessary’ (proportionality).⁵² Steyger also notes that proportionality requires that if the Treaty does not state the legal instrument to be used, a less binding action, such as a directive (which is binding only as to the result to be achieved, but not the form and method of achieving it),⁵³ should be used instead of a regulation.⁵⁴ Moussis further notes that less intrusive measures could include providing financial support, or a recommendation may suffice.⁵⁵

With respect to ‘exclusive competence’, art 2 of the *Treaty on the Functioning of the European Union* (‘TFEU’) provides that member states cannot legislate or adopt legally binding acts in areas where relevant treaties give exclusive competence to the European Union. Article 3(1) specifies that the Union has exclusive competence over the areas of: ‘customs union’; ‘the establishing of the competition rules necessary for the functioning of the internal market’; ‘monetary policy for Member States whose currency is the Euro’; ‘the

⁴⁹ Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 10.

⁵⁰ Case 56/86 OBEA [1987] ECR 1449, 28 cited in Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 10.

⁵¹ Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 10.

⁵² Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 9.

⁵³ TFEU art 288.

⁵⁴ Elies Steyger, *Europe and its Members: A Constitutional Approach* (Dartmouth Publishing, 1995) 66–67.

⁵⁵ Nicholas Moussis, *Guide to European Policies* (European Study Service, 14th ed, 2008–2009) 30.

conservation of marine biological resources under the common fisheries policy'; and 'common commercial policy'.⁵⁶ Article 3(2) provides that the Union has exclusive competence to conclude international agreements where they are required to do so by regulations, or where the agreement affects the internal functioning of the Union. Thus, the application of subsidiarity in the European Union acknowledges that, in some circumstances, it is more appropriate for certain decisions to be made or implemented at a central, rather than regional, level.

The European Union and member states are also given 'shared competence' by art 4(2) of the *TFEU* over the areas of 'internal market'; 'social policy'; 'economic, social and territorial cohesion', 'agriculture and fisheries, excluding conservation of marine biological resources'; 'environment'; 'consumer protection'; 'transport'; 'trans-European networks'; 'energy'; the 'area of freedom, security and justice'; and 'common safety concerns in public health matters'.⁵⁷ The Union and member states both have competence over aspects of 'research, technological development and space' where the Union can 'define and implement programs', according to art 4(3), and 'development cooperation and humanitarian aid' where the Union can 'carry out activities and conduct a common policy' in art 4(4). However, in both cases member states are not prevented from exercising their competence. Consequently, disputes between member states and the Union will arise in these latter two areas, where the community has 'non-exclusive competence'.⁵⁸ That is, where there is shared competence, or where both have competence.

Article 12 also provides direction to national Parliaments whose countries are members of the European Union, to respect the principle of subsidiarity. It states:

National Parliaments contribute actively to the good functioning of the Union: ... (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality ...

On 25 October 1993, the European Commission, Council and European Parliament made a declaration known as the *Interinstitutional Declaration on Democracy, Transparency and Subsidiarity*⁵⁹ in which they agreed to adopt an 'Institutional Agreement on procedures for implementing the principle of subsidiarity'.⁶⁰ The Agreement was in part made in response to Denmark's refusal, at a Referendum on 2 June 1992, to ratify the *TEU*. The refusal was generally regarded to be due to concerns about increased centralisation in the European Union.⁶¹

⁵⁶ *TFEU* art 3(1)(a)–(e).

⁵⁷ *TFEU* art 4(2)(a)–(k).

⁵⁸ Jean-Claude Piris, *Statement by Mr Piris to the Working Group on the Principle of Subsidiarity of the Convention on the Future of the Union* (Brussels, 26 June 2002), WD 04 WG I, 8.

⁵⁹ 'Interinstitutional Declaration on Democracy, Transparency and Subsidiarity' (1993) 10-1993 *Bulletin of European Communities* 118.

⁶⁰ 'Interinstitutional Declaration on Democracy, Transparency and Subsidiarity' (1993) 10-1993 *Bulletin of European Communities* 118, 119.

⁶¹ Gráinne de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam' (Jean Monnet Working Paper 7/99, Harvard Law School, 2000) 25. See also Elies Steyger, *Europe and its Members: A Constitutional Approach* (Dartmouth Publishing, 1995) 63.

The Agreement, whilst brief, highlights the importance of the principle of subsidiarity in its general provisions.⁶² It then outlines procedures to ensure the principle is observed.⁶³ For example, when exercising its right of initiative, the Commission must take the principle ‘into account’ and ‘show that it has been observed’. The European Parliament and Council are also required to take the principle into account when ‘exercising the powers conferred on them by Articles 138b and 152 respectively of the Treaty establishing the European Community’. More specifically, the Commission must include a statement about compliance with the principle in its explanatory memorandum. Also, a ‘justification’ of the principle must be given by the European Parliament or Council if they attempt to amend the ‘Commission’s text’ to include ‘more extensive or intensive intervention by the Community’. The final procedural statement in the Agreement is that the Commission, European Parliament and Council must adopt ‘internal procedures’ to check regularly that any action proposed to be taken by them complies with the principle of subsidiarity. The Agreement also provides that compliance with the principle of subsidiarity shall be regularly reviewed in accordance with ‘normal Community process’ and ‘the rules laid down in the Treaties’. It also provides for an annual report to be prepared detailing compliance with the principle, which shall be debated publicly.⁶⁴ Hence, there is an established procedure to encourage the European Parliament and Council to assess their compliance with subsidiarity during the legislative process. Further procedural safeguards are included in the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, discussed in the following section of this paper.

V. Protocol on the Application of the Principles of Subsidiarity and Proportionality

The *Protocol on the Application of the Principles of Subsidiarity and Proportionality* (‘the Protocol’), mentioned above in art 5(3) of the *TEU* was included in the *Treaty of Lisbon*, which was signed on 13 December 2007. The *Protocol* declares that the contracting parties are ‘wishing to ensure that decisions are taken as closely as possible to the citizens of the Union’. It provides guidance and direction to each institution in the European Union, namely the European Commission, the Council and European Parliament to adhere to the principles of subsidiarity and proportionality when drafting regulations.⁶⁵ Importantly, the *Protocol* provides for an ‘early warning system’ in the form of a process where national Parliaments can comment on whether a regulation conforms with subsidiarity before it is enacted.⁶⁶ This process is outlined below.

⁶² ‘Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 119, ‘General Provisions’.

⁶³ ‘Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 119, ‘Procedures’.

⁶⁴ ‘Interinstitutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity’ (1993) 10-1993 *Bulletin of European Communities* 119, ‘Review of Compliance with the Principle of Subsidiarity’.

⁶⁵ *Protocol* arts 3, 4, and 5.

⁶⁶ Peter Norman, *The Accidental Constitution: The Making of Europe’s Constitutional Treaty* (EuroComment, 2005) 76.

Article 2 provides for wide consultation which must ‘take into account the regional and local dimension of the action envisaged.’ The requirement to consult is dispensed with, however, in ‘cases of exceptional urgency’.⁶⁷ Draft regulations must be ‘justified’ as complying with the principles by containing ‘a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.’⁶⁸ National Parliaments are to be given eight weeks to give a ‘reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.’⁶⁹ National Parliaments are also directed to consult with regional Parliaments ‘where appropriate.’⁷⁰

Article 7(1) provides that these opinions must be taken into account by the body which has drafted the legislative act.⁷¹ Article 7(1) also provides that the opinion of a national Parliament shall be equal to two votes, with one vote for each house of Parliament if the national Parliament is bicameral.⁷²

Articles 7(2) and 7(3) specify procedures for reviewing the draft regulations, if the requisite number of national Parliaments give opinions to the effect that the principle has not been complied with. Under art 7(2), if these opinions with respect to a draft legislative act total one third of votes allocated to national Parliaments, then the draft legislative act ‘must be reviewed’.⁷³ However, the required number of votes is reduced to one quarter if the draft legislative act concerned ‘freedom, security and justice’ and was made under art 76 of the *TFEU*.⁷⁴ After this review the body drafting the regulation ‘may decide to maintain, amend or withdraw the draft’ and must provide reasons for their decision.⁷⁵

In addition to this, art 7(3) provides that if ‘under ordinary legislative procedure’,⁷⁶ in which the proposal for a legislative act originates in the Commission, reasoned opinions are received on a ‘proposal for a legislative act’ that total a ‘simple majority’⁷⁷ the proposal also ‘must be reviewed’. Similarly, the Commission ‘may decide to maintain, amend or withdraw the proposal’.⁷⁸ If the Commission chooses to ‘maintain’, that is, proceed with the proposal,

⁶⁷ *Protocol* art 2 reads in full, ‘Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.’

⁶⁸ *Protocol* art 5.

⁶⁹ *Protocol* art 6.

⁷⁰ *Protocol* art 6.

⁷¹ *Protocol* art 7(1).

⁷² *Protocol* art 7(1).

⁷³ *Protocol* art 7(2).

⁷⁴ *Protocol* art 7(2).

⁷⁵ *Protocol* art 7(2).

⁷⁶ See *TFEU* art 294, which provides that the ‘ordinary legislative procedure’ is based on ‘co-decision’, which is ‘based on the principle of parity and means that neither institution (European Parliament of Council) may adopt legislation without the other’s assent’: European Commission, *The Co-Decision or Ordinary Legislative Procedure* (31 January 2012) <http://ec.europa.eu/codecision/procedure/index_en.htm>. For an explanation of the process of the ‘ordinary legislative procedure’ see Gabriël A Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010) 21. See also, *Joint Declaration on Practical Arrangements for the Co-Decision Procedure (Article 251 of the EC Treaty)*, [2007] OJ C 145/02, art 5.

⁷⁷ ‘Simple majority’ is more than 50% of the persons voting. See *TFEU* art 238 formerly *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) (‘*EEC*’) art 205(1) and (2).

⁷⁸ *Protocol* art 7(3).

the Commission itself must give a reasoned opinion as to why the proposal complies with the principle of subsidiarity. This opinion must be submitted to the European Parliament and Council who must consider the proposal's compatibility with the principle, as well as the reasoned opinions of the national Parliaments and Commission before the first reading.⁷⁹ The proposal 'shall be given no further consideration' if 55% of Council members, or a majority of votes in the European Parliament find that the proposal is not compatible with the principle.⁸⁰

Article 9 of the Protocol requires that the Commission prepare and submit an annual report to the European Parliament, Council and national Parliaments on the application of the principle of subsidiarity in art 3b of the *TEU*, now art 5 of the *TEU*.

In summary, the practical application of the principle of subsidiarity in the European Union is primarily as a process of legislative review, prior to regulations being proposed or enacted. Cooper suggests that this makes the success of the principle difficult to assess because it is difficult to measure when action is *not* taken.⁸¹ However, if a regulation is enacted which a member state or states believes infringes the principle of subsidiarity, it can be challenged in the European Court of Justice. Therefore, decisions of the European Court of Justice make it possible to draw some conclusions about the meaning and effectiveness of the principle of subsidiarity in European Union law and to draw some comparisons with the principle in Catholic social theory. These decisions of the European Court of Justice demonstrate that whilst subsidiarity has been successful as a political judgment (in the form of a procedural safeguard during the legislative process), it has not been successfully used as a legal ground of challenge to Regulations or Directives that interfere with member state autonomy.

VI. Subsidiarity Decisions of the European Court of Justice

Article 19(3) of the *TEU* empowers the European Court of Justice to 'rule on actions brought by Member States'. In addition, the second paragraph of art 263 of the *TFEU* gives the Court jurisdiction with respect to actions brought by a member state on the grounds of lack of competence, infringement of essential procedural requirements, infringement of treaties or any rule of law relating to treaties. This would empower the Court to hear and determine a matter commenced by a member state or states on the basis of subsidiarity. Article 8 of the *Protocol* specifically refers to subsidiarity, stating that the European Court of Justice is empowered to hear and determine an action commenced by a member state or by the Committee of the Regions alleging that a legislative act has infringed the principle of subsidiarity. The European Court of Justice could annul regulations or directives that infringed the principle.

⁷⁹ *Protocol* art 7(3)(a).

⁸⁰ *Protocol* art 7(3)(b).

⁸¹ Ian Cooper, 'Subsidiarity and Autonomy in the European Union' in Louis W Pauly and William D Coleman, *Global Ordering: Institutions and Autonomy in a Changing World* (UBC Press, 2008) 234, 242.

However, the Court has been reluctant to employ the principle of subsidiarity to annul regulations. Tridimas suggests that this is because even though subsidiarity is a 'legally binding rule', whether or not it has been complied with involves a political judgment which the Court would rather leave to the relevant Community institutions to make.⁸² Tridimas observes that subsidiarity is most often used as a peripheral or 'supporting argument' rather than the main ground of review itself.⁸³ In the words of Tridimas: 'Subsidiarity has greater potential as a procedural ground than as a ground of substance'.⁸⁴

This failure of subsidiarity as a judicial principle to guard against centralisation in the European Union is evident from an examination of relevant case law from the European Court of Justice. The case law can be divided into three main categories which will now be discussed in turn. This article has selected one case example from each category of case law from the European Court of Justice. These cases have been chosen because they provide practical examples for the reader of the typical manner in which the European Court of Justice regards subsidiarity, and further, of how the principle has been used to justify centralisation in the European Union.

In the first category of cases subsidiarity was not directly pleaded as a ground by which Community directives or regulations should be annulled. Instead, it was indirectly pleaded as peripheral to other grounds of review.⁸⁵ For example, in the *Working Time Case*⁸⁶ the principle of subsidiarity was raised indirectly, as part of other pleas made to the Court. In this case, the United Kingdom of Britain and Northern Ireland ('the UK and Ireland') challenged a Council Directive, 93/104/EC, which provided for 'minimum health and safety requirements for the organisation of working time'⁸⁷ including making it the responsibility of member states to ensure 'minimum periods of daily rest, weekly rest and annual leave, as well as rest breaks and maximum weekly working time'.⁸⁸

The UK and Ireland argued that the Directive should be annulled. Their argument was that the relevant treaty provision only supported health and safety in the actual work place (that is, physical working conditions at work) and not broader employment entitlements such as leave and working hours. They argued that it did not allow for the 'adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and nature of legislative regulation of working time vary very widely between Member States.'⁸⁹ In deciding that the principle of subsidiarity had not been contravened, the Court reasoned that

⁸² Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 185.

⁸³ Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 184.

⁸⁴ Takis Tridimas, *The General Principles of EU Law* (Oxford University Press, 2006) 185.

⁸⁵ These cases are: *United Kingdom v Council* (C-84/94) [1996] ECR I-5793 ('*Working Time case*'); *Germany v Parliament and Council* (C-233/94) [1997] ECR I-2405 (*Deposit Guarantee case*); and *Germany v Commission* (Case T-374/04) [2007] ECR II-4431.

⁸⁶ For a discussion of this case see Gabriël A Moens, 'The Subsidiarity Principle and E.C. Directive 93/104' (1997) 34 *Australia and World Affairs* 51.

⁸⁷ *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5796.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, I-5808.

the relevant treaty provision contemplated action at a Community level, with the implementation being left to member states and that the Directive was consistent with this.⁹⁰

The Court's attitude toward subsidiarity was displayed in its reasoning elsewhere in the judgment. For example, when considering the scope of the relevant article under which the Council Directive was made, the Court adopted a broad interpretation. This is evident from the following statement, made early in the decision, which set the scene for the Court's dismissal of subsidiarity considerations later in the judgment:

There is nothing in the wording of Article 118a to indicate that the concepts of 'working environment', 'safety' and 'health' as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time. On the contrary, the words 'especially in the working environment' militate in favour of a broad interpretation of the powers which Article 118a confers upon the Council for the protection of the health and safety of workers. Moreover, such an interpretation of the words 'safety' and 'health' derives support in particular from the preamble to the *Constitution* of the World Health Organisation to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.⁹¹

In summary, the Court affirmed that the wording of the treaty, and therefore the powers of the Council, should be interpreted as broadly as possible, and should only be restricted by the express wording of the treaty. Significantly, the Court expressed a reluctance to question the judgment of the Council when enacting legislation, as shown by the following statement: 'it is to be remembered that it is not the function of the Court to review the expediency of measures adopted by the legislature.'⁹²

In the second category of cases, subsidiarity was pleaded directly as a ground of review. However once again, none of these challenges on the ground of failing to comply with subsidiarity were successful.⁹³ For example, subsidiarity was raised unsuccessfully as a substantive legal plea in *GlaxoSmithKline Services v Commission of the European Communities*.⁹⁴ In this case, GlaxoSmithKline, a large pharmaceutical company, challenged Decision 2001/791/EC adopted by the Commission, which declared it to have infringed art 81(1) EC (now art 101(1) TFEU). This Article prohibited any agreements that might be anti-competitive and therefore inhibit the common market. GlaxoSmithKline was deemed in the Decision to have infringed this provision by entering into an agreement with Spanish wholesalers which permitted two different pricing structures for pharmaceutical products. This was comprised of a lower price for pharmaceutical products financed through the Spanish Health system, and a higher price for products where Spanish law did not regulate

⁹⁰ Ibid, I-5809.

⁹¹ *United Kingdom v Council* (C-84/94) [1996] ECR I-5793, I-5800.

⁹² Ibid, I-5802.

⁹³ These cases are: *Germany v Parliament and Council* (C-376/98) [2000] ECR I-8419 (Tobacco Advertising Case'); *Netherlands v Parliament and Council* (C-377/98) [2001] ECR I-7079 ('Biotech Directive case'); *Chafiq Ayadi v Council* (Case T-253/02) [2006] ECR II-2139; *Leonid Minin v Commission* (Case T-362/04) [2007] ECR II-2003; and *GlaxoSmithKline Services v Commission* (Case T-168/01) [2006] ECR II-2969.

⁹⁴ *GlaxoSmithKline Services v Commission* (Case T-168/01) [2006] ECR II-2969 ('GlaxoSmithKline').

the prices. The Decision was adopted by the Commission after legal action was commenced by two Spanish trading associations and after complaints about the agreements were lodged with the Commission.

GlaxoSmithKline sought to annul the Decision. One of its legal pleas alleged a breach of the principle of subsidiarity. It argued that the inability to set two different pricing structures effectively meant that other member states would be forced to apply the Spanish prices, the result being an infringement of the principle of subsidiarity. However, the Court found that the principle of subsidiarity had not been infringed. The Court stated that:

where a series of objective factors of law or fact makes it possible to foresee with a sufficient degree of probability that such conduct may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, that conduct must be regarded as capable of affecting trade between Member States ... so that it is appropriate for the Community to take action, by reason of the scale and the effects of its action ...⁹⁵

In summary, the Court decided that the Commission had acted properly in making the Decision because the agreement could affect trade between member states, and therefore, was best carried out at a Commission level, rather than a member state level. Therefore, the principle of subsidiarity had been complied with.

In the third category of cases, subsidiary considerations were referred to the European Court of Justice by national Courts, but again, a breach of the principle of subsidiarity was not found in any of these cases.⁹⁶ Article 267 of the *TFEU* (formerly art 234 *EC*) provides that if a question arises in a court or tribunal of a member state regarding ‘the interpretation of Treaties’ or ‘the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union’ which it cannot give judgment without resolving, the questions may be referred to the European Court of Justice by the court or tribunal of the member state. One of these cases was the in the *Roaming Regulation* case.⁹⁷ The proceedings were commenced in the High Court of Justice of England and Wales, who referred the matter to the European Court of Justice. The initial challenge was commenced by several telecommunications companies, including Vodafone, which had telecommunications networks throughout the European Union. They contested the validity of the *Mobile Roaming (European Communities) Regulations 2007* (UK), which sought to implement European Union Regulation 717/2007 (‘the Regulation’). The Regulation concerned roaming on mobile

⁹⁵ Ibid, [201].

⁹⁶ Article 267 of the *TFEU* (formerly art 234 *EC*) provides that if a question arises in a court or tribunal of a member state regarding ‘the interpretation of Treaties’ or ‘the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union’ which it cannot give judgment without resolving, the questions may be referred to the European Court of Justice by the court or tribunal of the member state. The relevant cases are: *Hilmar Kellinghusen v Amt für Land- und Wasserwirtschaft Kiel* (Joined cases C-36 & 37/97) [1998] ECR I-6-337; *The Queen v Secretary of State for Health, Ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453 (‘*Second Tobacco case*’); and *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999 (‘*Roaming Regulation case*’).

⁹⁷ *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communication Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform* (Case C-58/08) [2010] ECR I-04999 (‘*Roaming Regulation case*’).

telephone networks throughout the European Union and capped the charges that telecommunications companies could charge for roaming services between member states.

The Regulation was part of a ‘Regulatory Framework’ adopted by the European Union in accordance with art 95 *TEU*⁹⁸ which states, ‘In the case of transport within the Union, discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question shall be prohibited’. The Court noted that it had previously held that subsidiarity applies to art 95 only to the extent that the Community is not given exclusive competence to regulate the internal market.⁹⁹ They reasoned that the Community had adopted the Regulation in order to achieve ‘a common approach, in order in particular to contribute to the smooth functioning of the internal market, allowing those operators to act within a single coherent regulatory framework’.¹⁰⁰ It was therefore necessary for there to be regulation at a Community level in order to achieve these objectives:

As is clear from recital 14 in the preamble to the regulation, the interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market. For that reason, the Community legislature decided that any action would require a joint approach at the level of both wholesale charges and retail charges, in order to contribute to the smooth functioning of the internal market in those services.¹⁰¹

The Court went on to conclude that the Community had made the correct decision, and in other words had complied with the principle of subsidiarity, by regulating the matter at a central level:

That interdependence means that the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation No 71/2007, the objective pursued by that regulation could be best achieved at Community level.¹⁰²

A consideration of the above case law, and of the procedural aspects of subsidiarity outlined above, reveals that the main success of subsidiarity in the European Union is as a political judgement in the form of a procedural principle to be applied during the process of enacting Regulations and issuing Directives, rather than as a legal ground of review. In this sense, it is analagous to subsidiarity as a moral or social principle in Catholic social teaching. Although subsidiarity has not been effective at a judicial level to annul centralist Regulations and Directives, cases such as *GlaxoSmithKline* and the *Roaming Regulation* case indicate that it has successfully been used to justify the appropriateness of action being undertaken at a central level. That is, where a political decision has been made by the European Parliament

⁹⁸ *Ibid.*, [3].

⁹⁹ *Ibid.*, [75].

¹⁰⁰ *Ibid.*, [76].

¹⁰¹ *Ibid.*, [77].

¹⁰² *Ibid.*, [78].

and Council that central (community) action is appropriate, the Court has been unwilling to overrule it. Consequently, amendments to the *TEU* and the *Protocol* are required to clarify the exact nature of the principle, particularly as a legal ground of challenge before the European Court of Justice. This will assist to achieve the intended objective of subsidiarity in the European Union to guard against centralisation at the expense of national autonomy.

VII. Conclusion

In his Encyclical Letter, *Quadragesimo Anno*, Pope Pius XI advocated for action to be taken, and decisions to be made, by an individual or by a lower level association rather than by a higher level association wherever possible, in order to empower the individual and respect his or her autonomy. These sentiments can be applied in a political sense, to promote decentralisation in the form of local decision making and action over centralised control, in order to achieve more expedient and regionally appropriate outcomes.

This paper has explored a specific example of the political application of the principle of subsidiarity through a discussion of the operation of the principle in the European Union. In the European Union the principle of subsidiarity requires that if a matter does not fall within the exclusive competence of the Community and can be better resolved by the individual member states the Community should *not* intervene, so that the matter can be resolved at a local level, by member states. It is stated in art 5(3) of the *TEU* and its procedural operation is outlined in further detail in the *Protocol*. The aim of subsidiarity, as embodied in these treaty documents, was to protect member state autonomy from central encroachment by laws (Directives and Regulations) made by the European Parliament and Council in areas of shared competence, and thus, to protect the autonomy of the national governments of member states to regulate issues that affect them. Hence, whilst Catholic social theory favours individual action over intervention by a higher authority, subsidiarity in the European Union favours national autonomy over central regulation. That is, member states in the European Union are equivalent to the ‘individual’ in Catholic social theory.

At the same time as promoting lower level action close to the individual, Catholic social teaching, specifically that espoused by Pope Leo XIII and Pope Pius XI, states that interference from a higher level association may sometimes be warranted. For example, by the Church as the ultimate guardian of the moral law, or, as advocated by Pope John XXIII and later Pope Benedict XVI, by a world-wide authority to address issues that are of international concern, such as the global financial crisis. The use of the principle of subsidiarity to justify matters being carried out at a higher level, can also be seen in the European Union from the wording of art 5(3) *TEU*, which not only gives exclusive competence to the central community over certain subject matters, but also contemplates that if matters that *cannot* be ‘better resolved’ by the member states they should be determined centrally.

Furthermore, whilst subsidiarity in Catholic social teaching can be described as a moral or social principle, the exact nature of the principle in the European Union remains unclear. Whilst its embodiment in relevant treaty provisions, and its inclusion and a ground of review suggests that the principle is a legal one, no Directives or Regulations have been overruled by the European Court of Justice for infringing the principle of subsidiarity. This was evident from an examination of several cases from the European Court of Justice, which suggested that the Court regards subsidiarity as a political judgment, best made by legislators.

In summary, the principle of subsidiarity, as expounded in Catholic social teaching, has a clear relevance and application in the political sphere, as illustrated by its inclusion as a seminal principle in European Union Law. Although its practical operation can be complex, and at times subjective, subsidiarity is a multi-layered and flexible principle that can be utilised to empower, inform, and enhance scholarship in these, and other significant areas.